scope of R&D efforts and investment. In contrast, to the extent that participants independently set the price and quantity [47] of their share of a collaboration's output and independently control other competitively significant decisions, an agreement's likely anticompetitive harm is reduced.[48]

3.34(e) Likelihood of Anticompetitive Information Sharing

The Agencies evaluate the extent to which competitively sensitive information concerning markets affected by the collaboration likely would be disclosed. This likelihood depends on, among other things, the nature of the collaboration, its organization and governance, and safeguards implemented to prevent or minimize such disclosure. For example, participants might refrain from assigning marketing personnel to an R&D collaboration, or, in a marketing collaboration, participants might limit access to competitively sensitive information regarding their respective operations to only certain individuals or to an independent third party. Similarly, a buying collaboration might use an independent third party to handle negotiations in which its participants' input requirements or other competitively sensitive information could be revealed. In general, it is less likely that the collaboration will facilitate collusion on competitively sensitive variables if appropriate safeguards governing information sharing are in place.

3.34(f) Duration of the Collaboration

The Agencies consider the duration of the collaboration in assessing whether participants retain the ability and incentive to compete against each other and their collaboration. In general, the shorter the duration, the more likely participants are to compete against each other and their collaboration.

3.35 Entry

Easy entry may deter or prevent profitably maintaining price above, or output, quality, service or innovation below, what likely would prevail in the absence of the relevant agreement. Where the nature of the agreement and market share and concentration data suggest a likelihood of anticompetitive harm that is not sufficiently mitigated by any continuing competition identified

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[47] Even if prices to consumers are set independently, anticompetitive harms may still occur if participants jointly set the collaboration's level of output. For example, participants may effectively coordinate price increases by reducing the collaboration's level of output and collecting their profits through high transfer prices, *i.e.*, through the amounts that participants contribute to the collaboration in exchange for each unit of the collaboration's output. Where a transfer price is determined by reference to an objective measure not under the control of the participants, (*e.g.*, average price in a different unconcentrated geographic market), competitive concern may be less likely.

[48] Anticompetitive harm also is less likely if individual participants may independently increase the overall output of the collaboration.

through the analysis in Section 3.34, the Agencies inquire whether entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the anticompetitive harm of concern. If so, the relevant agreement ordinarily requires no further analysis.

As a general matter, the Agencies assess timeliness, likelihood, and sufficiency of committed entry under principles set forth in Section 3 of the *Horizontal Merger Guidelines*.[49] However, unlike mergers, competitor collaborations often restrict only certain business activities, while preserving competition among participants in other respects, and they may be designed to terminate after a limited duration. Consequently, the extent to which an agreement creates and enables identification of opportunities that would induce entry and the conditions under which ease of entry may deter or counteract anticompetitive harms may be more complex and less direct than for mergers and will vary somewhat according to the nature of the relevant agreement. For example, the likelihood of entry may be affected by what potential entrants believe about the probable duration of an anticompetitive agreement. Other things being equal, the shorter the anticipated duration of an anticompetitive agreement, the smaller the profit opportunities for potential entrants, and the lower the likelihood that it will induce committed entry. Examples of other differences are set forth below.

For certain collaborations, sufficiency of entry may be affected by the possibility that entrants will participate in the anticompetitive agreement. To the extent that such participation raises the amount of entry needed to deter or counteract anticompetitive harms, and assets required for entry are not adequately available for entrants to respond fully to their sales opportunities, or otherwise renders entry inadequate in magnitude, character or scope, sufficient entry may be more difficult to achieve.[50]

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[49] Committed entry is defined as new competition that requires expenditure of significant sunk costs of entry and exit. *See* Section 3.0 of the *Horizontal Merger Guidelines*.

[50] Under the same principles applied to production and marketing collaborations, the exercise of monopsony power by a buying collaboration may be deterred or counteracted by the entry of new purchasers. To the extent that collaborators reduce their purchases, they may create an opportunity for new buyers to make purchases without forcing the price of the input above pre-relevant agreement levels. Committed purchasing entry, defined as new purchasing competition that requires expenditure of significant sunk costs of entry and exit — such as a new steel factory built in response to a reduction in the price of iron ore — is analyzed under principles analogous to those articulated in Section 3 of the *Horizontal Merger Guidelines*. Under that analysis, the Agencies assess whether a monopsonistic price reduction is likely to attract committed purchasing entry, profitable at pre-relevant agreement prices, that would not have occurred before the relevant agreement at those same prices. (Uncommitted new buyers are identified as participants in the relevant market if their demand responses to a price decrease are likely to occur within one year and without the expenditure of significant sunk costs of entry and exit. *See id.* at Sections 1.32 and 1.41.)

In the context of research and development collaborations, widespread availability of R&D capabilities and the large gains that may accrue to successful innovators often suggest a high likelihood that entry will deter or counteract anticompetitive reductions of R&D efforts. Nonetheless, such conditions do not always pertain, and the Agencies ask whether entry may deter or counteract anticompetitive R&D reductions, taking into account the likelihood, timeliness, and sufficiency of entry.

To be timely, entry must be sufficiently prompt to deter or counteract such harms. The Agencies evaluate the likelihood of entry based on the extent to which potential entrants have (1) core competencies (and the ability to acquire any necessary specialized assets) that give them the ability to enter into competing R&D and (2) incentives to enter into competing R&D. The sufficiency of entry depends on whether the character and scope of the entrants' R&D efforts are close enough to the reduced R&D efforts to be likely to achieve similar innovations in the same time frame or otherwise to render a collaborative reduction of R&D unprofitable.

3.36 Identifying Procompetitive Benefits of the Collaboration

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, as explained above, competitor collaborations have the potential to generate significant efficiencies that benefit consumers in a variety of ways. For example, a competitor collaboration may enable firms to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would otherwise be possible. Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. *See supra* Section 2.1. Indeed, the primary benefit of competitor collaborations to the economy is their potential to generate such efficiencies.

Efficiencies generated through a competitor collaboration can enhance the ability and incentive of the collaboration and its participants to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, through collaboration, competitors may be able to produce an input more efficiently than any one participant could individually; such collaboration-generated efficiencies may enhance competition by permitting two or more ineffective (*e.g.*, high cost) participants to become more effective, lower cost competitors. Even when efficiencies generated through a competitor collaboration enhance the collaboration's or the participants' ability to compete, however, a competitor collaboration may have other effects that may lessen competition and ultimately may make the relevant agreement anticompetitive.

If the Agencies conclude that the relevant agreement has caused, or is likely to cause, anticompetitive harm, they consider whether the agreement is reasonably necessary to achieve "cognizable efficiencies." "Cognizable efficiencies" are efficiencies that have been verified by the Agencies, that do not arise from anticompetitive reductions in output or service, and that cannot be achieved through practical, significantly less restrictive means. *See infra* Sections 3.36(a) and 3.36(b). Cognizable efficiencies are assessed net of costs produced by the competitor collaboration or incurred in achieving those efficiencies.

3.36(a) Cognizable Efficiencies Must Be Verifiable and Potentially Procompetitive

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the collaboration's participants. The participants must substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency; how and when each would be achieved; any costs of doing so; how each would enhance the collaboration's or its participants' ability and incentive to compete; and why the relevant agreement is reasonably necessary to achieve the claimed efficiencies (*see* Section 3.36 (b)). Efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified by reasonable means.

Moreover, cognizable efficiencies must be potentially procompetitive. Some asserted efficiencies, such as those premised on the notion that competition itself is unreasonable, are insufficient as a matter of law. Similarly, cost savings that arise from anticompetitive output or service reductions are not treated as cognizable efficiencies. *See* Example 9.

3.36(b) Reasonable Necessity and Less Restrictive Alternatives

The Agencies consider only those efficiencies for which the relevant agreement is reasonably necessary. An agreement may be "reasonably necessary" without being essential. However, if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement. In making this assessment, the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities.

The reasonable necessity of an agreement may depend upon the market context and upon the duration of the agreement. An agreement that may be justified by the needs of a new entrant, for example, may not be reasonably necessary to achieve cognizable efficiencies in different market circumstances. The reasonable necessity of an agreement also may depend on whether it deters individual participants from undertaking free riding or other opportunistic conduct that could reduce significantly the ability of the collaboration to achieve cognizable efficiencies. Collaborations sometimes include agreements to discourage any one participant from appropriating an undue share of the fruits of the collaboration or to align participants' incentives to encourage cooperation in achieving the efficiency goals of the collaboration. The Agencies assess whether such agreements are reasonably necessary to deter opportunistic conduct that otherwise would likely prevent the achievement of cognizable efficiencies. *See* Example 10.

3.37 Overall Competitive Effect

If the relevant agreement is reasonably necessary to achieve cognizable efficiencies, the Agencies assess the likelihood and magnitude of cognizable efficiencies and anticompetitive harms to determine the agreement's overall actual or likely effect on competition in the relevant market. To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to offset the potential of the agreement to harm consumers in the relevant market, for example, by preventing price increases.[51]

The Agencies' comparison of cognizable efficiencies and anticompetitive harms is necessarily an approximate judgment. In assessing the overall competitive effect of an agreement, the Agencies consider the magnitude and likelihood of both the anticompetitive harms and cognizable efficiencies from the relevant agreement. The likelihood and magnitude of anticompetitive harms in a particular case may be insignificant compared to the expected cognizable efficiencies, or vice versa. As the expected anticompetitive harm of the agreement increases, the Agencies require evidence establishing a greater level of expected cognizable efficiencies in order to avoid the conclusion that the agreement will have an anticompetitive effect overall. When the anticompetitive harm of the agreement is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the agreement from having an anticompetitive effect overall.

SECTION 4: ANTITRUST SAFETY ZONES

4.1 Overview

Because competitor collaborations are often procompetitive, the Agencies believe that "safety zones" are useful in order to encourage such activity. The safety zones set out below are designed to provide participants in a competitor collaboration with a degree of certainty in those situations in which anticompetitive effects are so unlikely that the Agencies presume the arrangements to be lawful without inquiring into particular circumstances. They are not intended to discourage competitor collaborations that fall outside the safety zones.

The Agencies emphasize that competitor collaborations are not anticompetitive merely because they fall outside the safety zones. Indeed, many competitor collaborations falling outside the safety zones are procompetitive or competitively neutral. The Agencies analyze arrangements outside the safety zones based on the principles outlined in Section 3 above.

The following sections articulate two safety zones. Section 4.2 sets out a general safety zone

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[51] In most cases, the Agencies' enforcement decisions depend on their analysis of the overall effect of the relevant agreement over the short term. The Agencies also will consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from the efficiencies (due to delay in the achievement of, or the realization of consumer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict.

applicable to any competitor collaboration.[52] Section 4.3 establishes a safety zone applicable to research and development collaborations whose competitive effects are analyzed within an innovation market. These safety zones are intended to supplement safety zone provisions in the Agencies' other guidelines and statements of enforcement policy.[53]

4.2 Safety Zone for Competitor Collaborations in General

Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected.[54] The safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis,[55] or to competitor collaborations to which a merger analysis is applied.[56]

4.3 Safety Zone for Research and Development Competition Analyzed in Terms of Innovation Markets

Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration on the basis of effects on competition in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required

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[52] *See* Sections 1.1 and 1.3 above.

[53] The Agencies have articulated antitrust safety zones in *Health Care Statements* 7 & 8 and the *Intellectual Property Guidelines*, as well as in the *Horizontal Merger Guidelines*. The antitrust safety zones in these other guidelines relate to particular facts in a specific industry or to particular types of transactions.

[54] For purposes of the safety zone, the Agencies consider the combined market shares of the participants and the collaboration. For example, with a collaboration among two competitors where each participant individually holds a 6 percent market share in the relevant market and the collaboration separately holds a 3 percent market share in the relevant market, the combined market share in the relevant market for purposes of the safety zone would be 15 percent. This collaboration, therefore, would fall within the safety zone. However, if the collaboration involved three competitors, each with a 6 percent market share in the relevant market, the combined market share in the relevant market for purposes of the safety zone would be 21 percent, and the collaboration would fall outside the safety zone. Including market shares of the participants takes into account possible spillover effects on competition within the relevant market among the participants and their collaboration.

[55] *See supra* notes 27-29 and accompanying text in Section 3.3.

[56] *See* Section 1.3 above.

specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration. In determining whether independently controlled R&D efforts are close substitutes, the Agencies consider, among other things, the nature, scope, and magnitude of the R&D efforts; their access to financial support; their access to intellectual property, skilled personnel, or other specialized assets; their timing; and their ability, either acting alone or through others, to successfully commercialize innovations. The antitrust safety zone does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis,[57] or to competitor collaborations to which a merger analysis is applied.[58]

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[57] *See supra* notes 27-29 and accompanying text in Section 3.3.

[58] *See* Section 1.3 above.

Appendix

Section 1.3

Example 1 (Competitor Collaboration/Merger)

Facts

Two oil companies agree to integrate all of their refining and refined product marketing operations. Under terms of the agreement, the collaboration will expire after twelve years; prior to that expiration date, it may be terminated by either participant on six months' prior notice. The two oil companies maintain separate crude oil production operations.

Analysis

The formation of the collaboration involves an efficiency-enhancing integration of operations in the refining and refined product markets, and the integration eliminates all competition between the participants in those markets. The evaluating Agency likely would conclude that expiration after twelve years does not constitute termination "within a sufficiently limited period." The participants' entitlement to terminate the collaboration at any time after giving prior notice is not termination by the collaboration's "own specific and express terms." Based on the facts presented, the evaluating Agency likely would analyze the collaboration under the *Horizontal Merger Guidelines*, rather than as a competitor collaboration under these Guidelines. Any agreements restricting competition on crude oil production would be analyzed under these Guidelines.

Section 2.3

Example 2 (Analysis of Individual Agreements/Set of Agreements)

Facts

Two firms enter a joint venture to develop and produce a new software product to be sold independently by the participants. The product will be useful in two areas, biotechnology research and pharmaceuticals research, but doing business with each of the two classes of purchasers would require a different distribution network and a separate marketing campaign. Successful penetration of one market is likely to stimulate sales in the other by enhancing the reputation of the software and by facilitating the ability of biotechnology and pharmaceutical researchers to use the fruits of each other's efforts. Although the software is to be marketed independently by the participants rather than by the joint venture, the participants agree that one will sell only to biotechnology researchers and the other will sell only to pharmaceutical researchers. The participants also agree to fix the maximum price that either firm may charge. The parties assert that the combination of these two requirements is necessary for the successful marketing of the new product. They argue that the market allocation provides each participant with adequate incentives to commercialize the product in its sector without fear that the other participant will free-ride on its efforts and that the maximum price prevents either participant from unduly exploiting its sector of the market to the detriment of sales efforts in the other sector.

Analysis

The evaluating Agency would assess overall competitive effects associated with the collaboration in its entirety and with individual agreements, such as the agreement to allocate markets, the agreement to fix maximum prices, and any of the sundry other agreements associated with joint development and production and independent marketing of the software. From the facts presented, it appears that the agreements to allocate markets and to fix maximum prices may be so intertwined that their benefits and harms "cannot meaningfully be isolated." The two agreements arguably operate together to ensure a particular blend of incentives to achieve the potential procompetitive benefits of successful commercialization of the new product. Moreover, the effects of the agreement to fix maximum prices may mitigate the price effects of the agreement to allocate markets. Based on the facts presented, the evaluating Agency likely would conclude that the agreements to allocate markets and to fix maximum prices should be analyzed as a whole.

Section 2.4

Example 3 (Time of Possible Harm to Competition)

Facts

A group of 25 small-to-mid-size banks formed a joint venture to establish an automatic teller machine network. To ensure sufficient business to justify launching the venture, the joint venture agreement specified that participants would not participate in any other ATM networks. Numerous other ATM networks were forming in roughly the same time period.

Over time, the joint venture expanded by adding more and more banks, and the number of its competitors fell. Now, ten years after formation, the joint venture has 900 member banks and controls 60% of the ATM outlets in a relevant geographic market. Following complaints from consumers that ATM fees have rapidly escalated, the evaluating Agency assesses the rule barring participation in other ATM networks, which now binds 900 banks.

Analysis

The circumstances in which the venture operates have changed over time, and the evaluating Agency would determine whether the exclusivity rule now harms competition. In assessing the exclusivity rule's competitive effect, the evaluating Agency would take account of the collaboration's substantial current market share and any procompetitive benefits of exclusivity under present circumstances, along with other factors discussed in Section 3. The Agencies would consider whether significant sunk investments were made in reliance on the exclusivity rule.

Section 3.2

Example 4 (Agreement Not to Compete on Price)

Facts

Net-Business and Net-Company are two start-up companies. They independently developed, and have begun selling in competition with one another, software for the networks that link users within a particular business to each other and, in some cases, to entities outside the business. Both Net-Business and Net-Company were formed by computer specialists with no prior business expertise, and they are having trouble implementing marketing strategies, distributing their inventory, and managing their sales forces. The two companies decide to form a partnership joint venture, NET-FIRM, whose sole function will be to market and distribute the network software products of Net-Business and Net-Company. NET-FIRM will be the exclusive marketer of network software produced by Net-Business and Net-Company. Net-Business and Net-Company will each have 50% control of NET-FIRM, but each will derive profits from NET-FIRM in proportion to the revenues from sales of that partner's products. The documents setting up NET-FIRM specify that Net-Business and Net-Company will agree on the prices for the products that NET-FIRM will sell.

Analysis

Net-Business and Net-Company will agree on the prices at which NET-FIRM will sell their individually-produced software. The agreement is one "not to compete on price," and it is of a type that always or almost always tends to raise price or reduce output. The agreement to jointly set price may be challenged as per se illegal, unless it is reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.

Example 5 (Specialization without Integration)

Facts

Firm A and Firm B are two of only three producers of automobile carburetors. Minor engine variations from year to year, even within given models of a particular automobile manufacturer, require re-design of each year's carburetor and re-tooling for carburetor production. Firms A and B meet and agree that henceforth Firm A will design and produce carburetors only for automobile models of even-numbered years and Firm B will design and produce carburetors only for automobile models of odd-numbered years. Some design and re-tooling costs would be saved, but automobile manufacturers would face only two suppliers each year, rather than three.

Analysis

The agreement allocates sales by automobile model year and constitutes an agreement "not to compete on . . . output." The participants do not combine production; rather, the collaboration consists solely of an agreement *not* to produce certain carburetors. The mere coordination of decisions on output is not integration, and cost-savings without integration, such as the costs saved by refraining from design and production for any given model year, are not a basis for avoiding per se condemnation. The agreement is of a type so likely to harm competition and to have no significant benefits that particularized inquiry into its competitive effect is deemed by the antitrust laws not to be worth the time and expense that would be required. Consequently, the evaluating Agency likely would conclude that the agreement is per se illegal.

Example 6 (Efficiency-Enhancing Integration Present)

Facts

Compu-Max and Compu-Pro are two major producers of a variety of computer software. Each has a large, world-wide sales department. Each firm has developed and sold its own word-processing software. However, despite all efforts to develop a strong market presence in word processing, each firm has achieved only slightly more than a 10% market share, and neither is a major competitor to the two firms that dominate the word-processing software market.

Compu-Max and Compu-Pro determine that in light of their complementary areas of design expertise they could develop a markedly better word-processing program together than either can produce on its own. Compu-Max and Compu-Pro form a joint venture, WORD-FIRM, to jointly develop and market a new word-processing program, with expenses and profits to be split equally. Compu-Max and Compu-Pro both contribute to WORD-FIRM software developers experienced with word processing.

Analysis

Compu-Max and Compu-Pro have combined their word-processing design efforts, reflecting complementary areas of design expertise, in a common endeavor to develop new word-processing software that they could not have developed separately. Each participant has contributed significant assets – the time and know-how of its word-processing software developers – to the joint effort. Consequently, the evaluating Agency likely would conclude that the joint word-processing software development project is an efficiency-enhancing integration of economic activity that promotes procompetitive benefits.

Example 7 (Efficiency-Enhancing Integration Absent)

Facts

Each of the three major producers of flashlight batteries has a patent on a process for manufacturing a revolutionary new flashlight battery -- the Century Battery -- that would last 100 years without requiring recharging or replacement. There is little chance that another firm could produce such a battery without infringing one of the patents. Based on consumer surveys, each firm believes that aggregate profits will be less if all three sold the Century Battery than if all three sold only conventional batteries, but that any one firm could maximize profits by being the first to introduce a Century Battery. All three are capable of introducing the Century Battery within two years, although it is uncertain who would be first to market.

One component in all conventional batteries is a copper widget. An essential element in each producers' Century Battery would be a zinc, rather than a copper widget. Instead of introducing the Century Battery, the three producers agree that their batteries will use only copper widgets. Adherence to the agreement precludes any of the producers from introducing a Century Battery.

Analysis

The agreement to use only copper widgets is merely an agreement not to produce any zinc-based batteries, in particular, the Century Battery. It is "an agreement not to compete on . . . output" and is "of a type that always or almost always tends to raise price or reduce output." The participants do not collaborate to perform any business functions, and there are no procompetitive benefits from an efficiency-enhancing integration of economic activity. The evaluating Agency likely would challenge the agreement to use only copper widgets as per se illegal.

Section 3.3

Example 8 (Rule-of-Reason: Agreement Quickly Exculpated)

Facts

Under the facts of Example 4, Net-Business and Net-Company jointly market their independently-produced network software products through NET-FIRM. Those facts are changed in one respect: rather than jointly setting the prices of their products, Net-Business and Net-Company will each independently specify the prices at which its products are to be sold by NET-FIRM. The participants explicitly agree that each company will decide on the prices for its own software independently of the other company. The collaboration also includes a requirement that NET-FIRM compile and transmit to each participant quarterly reports summarizing any comments received from customers in the course of NET-FIRM's marketing efforts regarding the desirable/undesirable features of and desirable improvements to (1) that participant's product and (2) network software in general. Sufficient provisions are included to prevent the company-specific information reported to one participant from being disclosed to the other, and those provisions are followed. The information pertaining to network software in general is to be reported simultaneously to both participants.

Analysis

Under these revised facts, there is no agreement "not to compete on price or output." Absent any agreement of a type that always or almost always tends to raise price or reduce output, and absent any subsequent conduct suggesting that the firms did not follow their explicit agreement to set prices independently, no aspect of the partnership arrangement might be subjected to per se analysis. Analysis would continue under the rule of reason.

The information disclosure arrangements provide for the sharing of a very limited category of information: customer-response data pertaining to network software in general. Collection and sharing of information of this nature is unlikely to increase the ability or incentive of Net-Business or Net-Company to raise price or reduce output, quality, service, or innovation. There is no evidence that the disclosure arrangements have caused anticompetitive harm and no evidence that the prohibitions against disclosure of firm-specific information have been violated. Under any plausible relevant market definition, Net-Business and Net-Company have small market shares, and there is no other evidence to suggest that they have market power. In light of these facts, the evaluating Agency would refrain from further investigation.

Section 3.36(a)

Example 9 (Cost Savings from Anticompetitive Output or Service Reductions)

Facts

Two widget manufacturers enter a marketing collaboration. Each will continue to manufacture and set the price for its own widget, but the widgets will be promoted by a joint sales force. The two manufacturers conclude that through this collaboration they can increase their profits using only half of their aggregate pre-collaboration sales forces by (1) taking advantage of economies of scale -- presenting both widgets during the same customer call -- and (2) refraining from time-consuming demonstrations highlighting the relative advantages of one manufacturer's widgets over the other manufacturer's widgets. Prior to their collaboration, both manufacturers had engaged in the demonstrations.

Analysis

The savings attributable to economies of scale would be cognizable efficiencies. In contrast, eliminating demonstrations that highlight the relative advantages of one manufacturer's widgets over the other manufacturer's widgets deprives customers of information useful to their decision making. Cost savings from this source arise from an anticompetitive output or service reduction and would not be cognizable efficiencies.

Section 3.36(b)

Example 10 (Efficiencies from Restrictions on Competitive Independence)

Facts

Under the facts of Example 6, Compu-Max and Compu-Pro decide to collaborate on developing and marketing word-processing software. The firms agree that neither one will engage in R&D for designing word-processing software outside of their WORD-FIRM joint venture. Compu-Max papers drafted during the negotiations cite the concern that absent a restriction on outside word-processing R&D, Compu-Pro might withhold its best ideas, use the joint venture to learn Compu-Max's approaches to design problems, and then use that information to design an improved word-processing software product on its own. Compu-Pro's files contain similar documents regarding Compu-Max.

Compu-Max and Compu-Pro further agree that neither will sell its previously designed word-processing program once their jointly developed product is ready to be introduced. Papers in both firms' files, dating from the time of the negotiations, state that this latter restraint was designed to foster greater trust between the participants and thereby enable the collaboration to function more smoothly. As further support, the parties point to a recent failed collaboration involving other firms who sought to collaborate on developing and selling a new spread-sheet program while independently marketing their older spread-sheet software.

Analysis

The restraints on outside R&D efforts and on outside sales both restrict the competitive independence of the participants and could cause competitive harm. The evaluating Agency would inquire whether each restraint is reasonably necessary to achieve cognizable efficiencies. In the given context, that inquiry would entail an assessment of whether, by aligning the participants' incentives, the restraints in fact are reasonably necessary to deter opportunistic conduct that otherwise would likely prevent achieving cognizable efficiency goals of the collaboration.

With respect to the limitation on independent R&D efforts, possible alternatives might include agreements specifying the level and quality of each participant's R&D contributions to WORD-FIRM or requiring the sharing of all relevant R&D. The evaluating Agency would assess whether any alternatives would permit each participant to adequately monitor the scope and quality of the other's R&D contributions and whether they would effectively prevent the misappropriation of the other participant's know-how. In some circumstances, there may be no "practical, significantly less restrictive" alternative.

Although the agreement prohibiting outside sales might be challenged as per se illegal if not reasonably necessary for achieving the procompetitive benefits of the integration discussed in Example 6, the evaluating Agency likely would analyze the agreement under the rule of reason if it could not adequately assess the claim of reasonable necessity through limited factual inquiry. As a general matter, participants' contributions of marketing assets to the collaboration could more readily be monitored than their contributions of know-how, and neither participant may be capable of misappropriating the other's marketing contributions as readily as it could misappropriate know-how. Consequently, the specification and monitoring of each participant's marketing contributions could be a "practical, significantly less restrictive" alternative to prohibiting outside sales of pre-existing products. The evaluating Agency, however, would examine the experiences of the failed spread-sheet collaboration and any other facts presented by the parties to better assess whether such specification and monitoring would likely enable the achievement of cognizable efficiencies.

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JUSTICE DEPARTMENT CLOSES ANTITRUST INVESTIGATION INTO THE MOVIELINK MOVIES-ON-DEMAND JOINT VENTURE

Department Does Not Find that the Joint Venture Harms Competition or Consumers

WASHINGTON, D.C. - The Department of Justice's Antitrust Division issued the following statement today after the closing of its investigation into Movielink, a joint venture formed by five major movie studios - Sony (Columbia-TriStar Pictures), Warner Bros., MGM, Paramount and Universal - to provide video-on-demand services:

"The Division's substantial investigation of Movielink does not indicate that the formation of this joint venture by five of the major movie studios harmed competition or consumers of movies. The investigation focused on whether formation of the joint venture facilitated collusion among the studios or decreased their incentives to license movie content to competing video-on-demand (VOD) providers. The Division considered several theories of competitive harm but ultimately determined that the evidence does not support a conclusion that the structure of the joint venture increased prices or otherwise reduced competition in the retail markets in which Movielink competes. The Division will continue to monitor activity in these emerging markets as part of its ongoing enforcement of the antitrust laws."

(Background information is attached.)

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04-388

DEPARTMENT OF JUSTICE ANTITRUST DIVISION STATEMENT ON THE CLOSING OF ITS INVESTIGATION OF MOVIELINK, A STUDIO-OWNED VIDEO-ON-DEMAND MOVIE DISTRIBUTION JOINT VENTURE

The Antitrust Division of the Department of Justice recently closed its investigation of Movielink, a joint venture formed by five movie studios - Sony (Columbia-TriStar Pictures), Warner Bros., MGM, Paramount and Universal - to provide video-on-demand (known as "VOD") services to consumers. After a thorough review, the Antitrust Division has determined that the evidence does not show that the formation of the Movielink venture has reduced competition or harmed consumers.

The Antitrust Division began investigating the Movielink joint venture when it was publicly announced in August 2001 (at the time, the joint venture was known as "Moviefly"). Shortly after that, the Division also began investigating another studio-owned VOD joint venture, Movies.com, which was announced by Disney and Fox in September 2001. Disney and Fox announced that they were abandoning their collaboration on the Movies.com joint venture in Spring 2002, and consequently, the Division's investigation since then has focused on the Movielink joint venture. The Division has obtained extensive information from Movielink's studio partners and interviewed numerous industry participants, including cable and satellite providers, technology providers, home video retailers, and other VOD distributors.

The Division provides this statement pursuant to its policy on the issuance of investigation closing statements, available at http://www.usdoj.gov/atr/public/guidelines/201888. htm. This statement is limited by the Division's obligation to protect the confidentiality of certain information obtained in its investigations. As in most of its investigations, the Division's evaluation has been highly fact-specific, and many of the relevant underlying facts are not public. Consequently, readers should not draw overly broad conclusions regarding how the Division is likely in the future to analyze other collaborations or activities, or transactions involving particular firms. This statement does not bind the Division in any future enforcement action.

Post-Theatrical Film Distribution and the Development of VOD

Following a movie's initial release and exhibition in movie theaters, movie studios typically license films for in-home viewing by consumers through a variety of different types of distribution methods. The primary methods for in-home viewing are home video (which includes VHS and DVDs), pay-per-view (PPV), video-on-demand (VOD), pay television, and basic television (such as broadcast and basic cable). Historically, the studios have attempted to stagger the release dates to these different distribution methods, and each sequential release period is referred to in the industry as a viewing "window." For example, a film is generally available in the home video window on VHS and DVD for a certain period of time before it is released to PPV, with pay cable and eventually basic television following later in the sequential release pattern.

VOD is a new technology that has enabled the studios to distribute their films in digital format to consumers over two primary platforms, the Internet and digital cable. VOD is similar to existing PPV services in that it enables consumers to order a movie for viewing at home, direct to their televisions (or, in the case of Internet services, to their PCs). Unlike PPV, though, which has set start times and cannot be stopped, paused or rewound during viewing, VOD allows consumers to have VCR-like functionality while watching a film.

The Movielink Joint Venture

Movielink was formed in August 2001 as a joint venture between five equal studio partners - Sony Pictures Entertainment, Inc., Paramount Pictures Corp., Metro-Goldwyn-Mayer Studios Inc., Warner Bros., and Universal Studios - each of which is one of the major movie studios in the United States. Collectively, these five studios account for approximately 50% of the domestic box office revenues each year in the United States. Each partner studio entered into a content licensing agreement with the joint venture, authorizing Movielink to deliver new release films, as well as older "library" titles, over the Internet. Movielink began delivering movies to consumers over the Internet on November 12, 2002. It offers films distributed by its five studio equity partners, as well as films from other studios who have entered into licensing agreements with the joint venture.

The terms of the Movielink agreements provide that each studio determines pricing and release dates for its own films. To date, the Movielink studios have been releasing titles for viewing over the service during the PPV window, and pricing has ranged from $1.99 to $4.99 per film. Customers can pay by credit card to download films from Movielink's website. Once a customer pays for a film, he or she has 30 days to watch the film. Once the customer begins watching the film, he or she can keep it for 24 hours.

The Division's Analysis

Although a joint venture may be procompetitive, any agreement among major horizontal competitors in a concentrated industry to collaborate and jointly market their products or services raises potential antitrust concerns.

Because the Movielink joint venture involves vertical integration, the Division analyzed the product market at two levels of distribution: the upstream VOD licensing level and the downstream consumer retail level. With respect to upstream VOD licensing, the Division examined whether Movielink diminished competition among its partner movie studios in the terms on which they licensed their movies to third-party services that sought to compete with the joint venture. With respect to the downstream retail level, the Division considered not only the potential exchange of information, but also the extent to which VOD products compete with other products, such as home video and PPV.

Conclusion

The Division devoted substantial resources to the investigation into whether the Movielink joint venture is likely to result in potential anticompetitive effects harmful to consumers. The Division concluded that the evidence did not support a finding that Movielink had adversely affected competition through increased prices or decreased output. Accordingly, the Division has closed its investigation. The Division will continue to monitor licensing and other activities of the studios and Movielink in this evolving industry as part of our vigilant enforcement of the antitrust laws.

DIRECTV

AT&T and DIRECTV Sign Three-Year Extension Agreement to Deliver AT&T | DIRECTV Service to AT&T Customers

Millions of Customers Continue to Have Access to a Compelling and Exclusive AT&T | DIRECTV Quad-Play Bundle Option

EL SEGUNDO, Calif.--(BUSINESS WIRE)-- DIRECTV and AT&T* signed a three-year extension to their commercial agreement and will continue to offer a co-branded version of DIRECTV's satellite television service across the 22 states where AT&T offers residential broadband and voice service. This agreement, which has been extended through March 2015, will enable both companies to provide millions of customers with access to an exclusive quadruple-play bundle of AT&T | DIRECTV service and AT&T broadband, home phone and wireless voice services, as well as bundled discounts when AT&T | DIRECTV service is combined with qualifying AT&T services.

Through a separate agreement, DIRECTV also sells AT&T broadband services, including AT&T U-verse High Speed Internet, through its sales distribution channels and to existing DIRECTV customers.

"Over the past three years DIRECTV and AT&T worked together to deliver a compelling bundled service at a great value," said Paul Guyardo, executive vice president and CMO for DIRECTV. "With this new agreement, we have a lot in the works to expand our partnership."

"We want all of our customers to have the option to receive a complete, integrated bundle of services from us, including TV," said Jeff Weber, vice president of video services, AT&T Mobility and Consumer Markets. "AT&T | DIRECTV service allows us to offer customers the best entertainment and communication services in areas where U-verse is not available, including compelling features that enhance their entertainment experience."

AT&T | DIRECTV service customers have access to a variety of DIRECTV programming and services, including:

- Access to more than 170 full-time High Definition (HD) channels.
- Exclusive sports programming packages, including NFL SUNDAY TICKET™.
- DIRECTV Whole-Home DVR service, where customers can watch shows in one room and finish watching in any other room, in up to 15 rooms, all in HD with one HD DVR.
- Up to 400 of the newest movie releases, some available months before Netflix® and Redbox®—all in 1080p HD, the same format as Blu-ray™. Plus instant access to up to 7,000 VOD shows and movies at no extra charge.
- Superior television service that has received higher customer satisfaction than the leading cable companies for eleven years running according to the 2011 American Customer Satisfaction Index.

**AT&T products and services are provided or offered by subsidiaries and affiliates of AT&T Inc. under the AT&T brand and not by AT&T Inc.*

About DIRECTV:

DIRECTV (NASDAQ: DTV) is one of the world's leading providers of digital television entertainment services delivering a premium video experience through state-of-the-art technology, unmatched programming and industry leading customer service to more than 30 million customers in the U.S. and Latin America. In the U.S., DIRECTV offers its 19.4 million customers access to more than 170 HD channels and Dolby-Digital® 5.1 theater-quality sound, access to exclusive sports programming such as NFL SUNDAY TICKET™, Emmy award winning technology and higher customer satisfaction than the leading cable companies for ten years running. DIRECTV Latin America, through its subsidiaries and affiliated companies in Brazil, Mexico, Argentina, Venezuela, Colombia, and other Latin American countries, leads the pay-TV category in technology, programming and service, delivering an unrivaled digital television experience to more than 10.6 million customers. DIRECTV sports and entertainment properties include three Regional Sports Networks (Northwest, Rocky Mountain and Pittsburgh) as well as a 60 percent interest in Game Show Network. For the most up-to-date information on DIRECTV, please visit www.directv.com.

About AT&T

AT&T Inc. (NYSE:T) is a premier communications holding company and one of the most honored companies in the world. Its subsidiaries and affiliates — AT&T operating companies — are the providers of AT&T services in the United States and around the world. With a powerful array of network resources that includes the nation's fastest mobile broadband network, AT&T is a leading provider of wireless, Wi-Fi, high speed Internet, voice and cloud-based services. A leader in mobile broadband and emerging 4G capabilities, AT&T also offers the best wireless coverage worldwide of any U.S. carrier, offering the most wireless phones that work in the most countries. It also offers advanced TV services under the AT&T U-verse® and AT&T | DIRECTV brands. The company's suite of IP-based business communications services is one of the most advanced in the world. In domestic markets, AT&T Advertising Solutions and AT&T Interactive are known for their leadership in local search and advertising.

Additional information about AT&T Inc. and the products and services provided by AT&T subsidiaries and affiliates is available at http://www.att.com. This AT&T news release and other announcements are available at http://www.att.com/newsroom and as part of an RSS feed at www.att.com/rss. Or follow our news on Twitter at @ATT.

AT&T
Jill Rountree, (512) 495-7186
jrountree@attnews.us
or
DIRECTV
Robert Mercer, (310) 964-4683
rgmercer@directv.com

Source: DIRECTV

Newsroom

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DIRECTV and CenturyLink Sign Agreement to Offer Video Services to CenturyLink Customers

New Deal Enables DIRECTV and CenturyLink to Offer Service Bundles in 33 States
Aug 12, 2010

MONROE, La., – DIRECTV, the world's most popular video service, and CenturyLink (NYSE: CTL), a leading provider of high-quality broadband, entertainment and voice services, have reached an agreement to sell DIRECTV as part of CenturyLink's residential service bundles. The terms of the agreement were not disclosed.

The fourth largest telecommunications company in the U. S., CenturyLink, began Aug. 1 marketing and selling the DIRECTV service bundle to CenturyLink's residential customers throughout its 33-state service area. The service bundles will include discounts for video, home phone and high-speed broadband service.

"Our relationship with DIRECTV allows CenturyLink to continue to provide the majority of our residential customers throughout our 33-state footprint with a strong combination of voice, internet and television services," said Shirish Lal, CenturyLink's senior vice president of marketing.

About CenturyLink

CenturyLink is a leading provider of high-quality broadband, entertainment and voice services over its advanced communications networks to consumers and businesses in 33 states. CenturyLink, headquartered in Monroe, La., is an S&P 500 company and is included among the Fortune 500 list of America's largest corporations. For more information on CenturyLink, visit www.centurylink.com.

Media Coverage

03/06/2012	CenturyLink's Broadband Strategy: Big News for 2012
01/30/2012	CenturyLink enhances its Prism IPTV offering with Microsoft Mediaroom
11/04/2011	CenturyLink's Karen Puckett guides company to top three in telecommunications providers
10/03/2011	CenturyLink Rolls Out Low-Cost Internet Service

Frontier, A Citizens Communications Company

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Press Release

Frontier Communications Teams with AT&T to Offer Wireless Voice and Data Products

STAMFORD, Conn.--(BUSINESS WIRE)--Nov. 15, 2011-- Frontier Communications Corporation (NYSE: FTR), the largest provider of communications services focused on rural America, today announced an agreement that will offer Frontier customers a broad assortment of AT&T smartphones and access to its mobile broadband network.

"Wireless is a fundamental communications requirement, and we're thrilled Frontier has chosen AT&T as its provider of mobility solutions," said Glenn Lurie, president of emerging devices, resale and partnerships for AT&T. "Frontier customers will have access to a wide variety of AT&T smartphones, tablets and applications, along with our mobile broadband network."

The three-year agency agreement between Frontier and AT&T Mobility complements Frontier's robust portfolio of broadband, voice and satellite TV services. The agreement will offer Frontier customers the benefits of AT&T's mobile broadband network and a wide array of wireless devices and applications as part of a Frontier bundle, all on a single bill from Frontier. AT&T Mobility and Frontier plan to trial the offering in the first half of 2012; once operational processes are complete the offering will be available throughout Frontier's nationwide footprint.

"Teaming with one of the most respected brands in global communications will cost-effectively address our customers' desire for a single-source provider for all their communications needs," said Maggie Wilderotter, Chairman and CEO of Frontier. "Frontier, with AT&T Mobility services, brings our customers the best cellular service, combined with Frontier's High Speed Internet, Video, and other products."

Frontier customers who subscribe to AT&T's wireless services will enjoy access to AT&T's more than 29,000 Wi-Fi Hot Spots in the United States. Frontier's broadband, voice and Internet services will continue to be supported by the company's locally-based technicians and 100-percent U.S.–based workforce.

About Frontier Communications

Frontier Communications Corporation (NYSE: FTR) offers voice, High-Speed Internet, satellite video, wireless Internet data access, data security solutions, bundled offerings, specialized bundles for small businesses and home offices, and advanced business communications for medium and large businesses in 27 states and with approximately 15,250 employees. Frontier is included in the S&P 500 Index and is the largest provider of communications services focused on rural America. It has a 100 percent U.S.-based workforce. More information is available at www.frontier.com and www.frontier.com/ir.

About AT&T

AT&T Inc. (NYSE:T) is a premier communications holding company and one of the most honored companies in the world. Its subsidiaries and affiliates – AT&T operating companies – are the providers of AT&T services in the United States and around the world. With a powerful array of network resources that includes the nation's fastest mobile broadband network, AT&T is a leading provider of wireless, Wi-Fi, high speed Internet, voice and cloud-based services. A leader in mobile broadband and emerging 4G capabilities, AT&T also offers the best wireless coverage worldwide of any U.S. carrier, offering the most wireless phones that work in the most countries. It also offers advanced TV services under the AT&T U-verse® and AT&T | DIRECTV brands. The company's suite of IP-based business communications services is one of the most advanced in the world. In domestic markets, AT&T Advertising Solutions and AT&T Interactive are known for their leadership in local search and advertising.

Additional information about AT&T Inc. and the products and services provided by AT&T subsidiaries and affiliates is available at http://www.att.com. This AT&T news release and other announcements are available at http://www.att.com/newsroom and as part of an RSS feed at www.att.com/rss. Or follow our news on Twitter at @ATT.

Source: Frontier Communications Corporation

Frontier Communications Corporation
Steve Crosby
SVP, Government Affairs & Public Relations
916-206-8198
steven.crosby@ftr.com